UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:		
BURNDY LLC	Case Nos.	34-CA-065746
-and		34-CA-079296
GLASS MOLDERS POTTERY PLASTICS & ALLIED WORKERS LOCAL 39B		
BURNDY LLC		
-and-	Case No.	34-CA-078077
IUE-CWA LOCAL 485	December 7, 2015	

OPPOSITION TO NOTICE OF RATIFICATION

On July 31, 2013, Administrative Law Judge Lauren A. Esposito issued a decision in this case. On that same day, the case was transferred to and continued at the National Labor Relations Board. On September 18, 2013, Respondent Burndy LLC ("Respondent") filed Exceptions to the ALJ's decision and a supporting brief. In Exception No. 1, the Respondent challenged the authority of Acting General Counsel, Lafe Solomon (and his agents) to investigate the unfair labor practice charges filed against Respondent, to issue a complaint against Respondent, and then to prosecute the case because of Mr. Solomon's invalid appointment.[1] Respondent argued in its accompanying brief that Mr. Solomon had not been properly appointed based on the Federal Vacancies Reform Act (FVRA). On September 26, 2013, Counsel for the General Counsel filed an Answering Brief to Respondent's Exceptions in which he responded on behalf of the Acting General Counsel to Respondent's Exceptions.

[1] Respondent had also asserted as an affirmative defense in its Answer to the Consolidated Complaint that Mr. Solomon lacked the authority to issue the Consolidated Complaint.

Counsel for the General Counsel completely ignored Respondent's challenge to Mr. Solomon's appointment under the FVRA. Accordingly, the General Counsel waived or forfeited that argument. See, e.g., Carlisle Ventures, Inc. v. Banco Espanol De Credito, S.A., 176 F.3d 601, 609 (2d Cir. 1999) (holding appellant waived argument where its reply brief failed to respond to opposing party's contrary assertions and did not otherwise point to any evidence disputing those assertions); Wannall v. Honeywell, Inc., 775 F.3d 425 (D.C. Cir. 2014) ([District Court Local Rule 7(b)] is understood to mean that if a party files an opposition to a motion and therein addresses only some of the movant's arguments, the court may treat the unaddressed arguments as conceded.")

On November 18, 2015, the current General Counsel, Richard Griffin, *sua sponte* filed a Notice of Ratification in which he purports to ratify the complaint unlawfully issued by Acting General Counsel Solomon on July 31, 2012. The General Counsel avers that he did this "after appropriate review and consideration with my staff." In the cover letter to his Notice of Ratification, the General Counsel requests that "the Notice of Ratification be placed in the case record." A review of this case docket on the Board's website indicates that the General Counsel's Notice of Ratification is listed as a "Board" document and appears to now be a part of the record in this case.

Respondent challenges the General Counsel's request to have his Notice of Ratification added to the case record at this time, as well as the merits of the Notice of Ratification on the following grounds:

1. After the case has been tried and transferred to the Board, there is no authority for any party to the proceeding, including the General Counsel, to file or add a self-serving document to the record. Indeed, the Administrative Procedures Act clearly explains that the

"transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title . . . ." 5 U.S.C. § 556(e) (2015). The NLRB's Rules and Regulations which also specify which documents will "constitute the record in the case," do not reference or provide for the consideration of the "Notice of Ratification." NLRB Rules and Regulations, Series 8, Sec. 102.45(b). The Rules and Regulations do not authorize any party to unilaterally file or add any document—self-serving or otherwise—to the record. See, e.g., Lansing Automakers Fed. Credit Union & Local 459, 355 NLRB 1345 (2010) (granting the General Counsel's motion to strike affidavits submitted by the respondent because such affidavits were "outside the record"); Mohawk Industries, 334 NLRB 1170 (2001) (granting the General Counsel's motion to strike portions of respondent's answering brief because respondent attached documents to its brief which were not admitted into the record").

Further, it is improper for the Board to docket a document, in this case the General Counsel's Notice of Ratification, without allowing the other parties an opportunity to address the General Counsel's request. As noted earlier, the Counsel for the General Counsel in responding to Respondent's Exceptions ignored Respondent's argument that the Acting General Counsel lacked authority to act due to his improper appointment under the FVRA. Now, more than two years after the Respondent filed its Exceptions and more than two years after a lawfully appointed General Counsel was confirmed, the General Counsel cannot purport to address the issue through its filing of the Notice of Ratification. Also, the Board and the General Counsel are by statute supposed to be independent from each other. NLRB v. United Food and Commercial Worker's Union, Local 23, 484 U.S. 112, 124 (1987). Based on the General

Counsel's actions here and the Board's apparent reaction to the General Counsel's filing, such a separation of the two entities is called into question.

2. In SW Gen. Inc. v. NLRB, 796 F.3d 67 (D.C. Cir. 2015), the United States Court of Appeals for the District of Columbia Circuit held that Mr. Solomon was unlawfully appointed as General Counsel and served in that position in violation of the FVRA after January 5, 2011. In finding Mr. Solomon's actions to be voidable, the Court noted that "a different General Counsel may have imposed different requirements and procedures during his tenure." Id. at 80. Therefore, because the unfair labor practice complaint in this case was issued by Mr. Solomon after January 5, 2011, Respondent submits that a General Counsel with the proper authority to issue unfair labor practice complaints may have declined to issue a complaint in this case. Accordingly, Respondent has demonstrated that the "FVRA violation is non-harmless under the Administrative Procedure Act." Id. at 80.

3. Further, the instant FVRA violation is a structural error that cannot be rendered un-harmless by the General Counsel's de novo review. By purporting to ratify a complaint which was issued more than three years ago, the General Counsel has effectively circumvented the FVRA and rendered it meaningless. The General Counsel's position, taken to the extreme, means that the President need not ever appoint a General Counsel according to the requirements of the FVRA, except to ratify the actions of prior Acting General Counsels. This is not what Congress envisioned when it passed the FVRA to "create a clear and exclusive process to govern the performance of duties of offices in the Executive Branch that are filled through presidential appointment by and with the consent of the Senate when a Senate confirmed official has died, resigned, or is otherwise unable to perform the functions and duties of the office." Sen. Rep. No. 105-250, at 1 (1998). The General Counsel's purported authority to ratify the actions of the

unlawfully appointed Acting General Counsel effectively permits him to insulate the unlawful actions taken by Mr. Solomon from legal redress. Further, the General Counsel's reliance on Section 3348(e)(1) of the FVRA is misplaced. The reason Congress exempted the General Counsel position from Section 3348 of the FVRA was to preserve the separation between the responsibilities of General Counsel and of the independence of the Board members, which would otherwise be intermingled if the Board members were to perform the function of the General Counsel as required by Section 3348(b)(2) when the General Counsel position is vacant. Sen. Rep. No. 105-250, at 20 (1998).

4. The invalidly-issued complaint prejudiced Respondent because had another validly-designated General Counsel opted not to issue an unfair labor practice complaint, in whole or in part, Respondent would not have had to incur the significant expenses of proceeding to a trial and filing exceptions with the Board. Nor does the General Counsel's statement that he ratified the prior Complaint "after appropriate review and consideration with my staff" provide any justification. Based on what occurred in this case, this is obviously a perfunctory statement. Had the General Counsel done an "appropriate review," the General Counsel would have seen that after the very first day of the unfair labor practice hearing, the Counsel for the General Counsel withdrew Paragraphs 26, 27, 28, 29, 30, 33, 35, and parts of 39 of the Complaint, which related to the Respondent's alleged failure to provide requested information to the Union and its allegedly unlawful request that the Union pay for the expense of obtaining this information. In withdrawing the allegations, the Counsel for the General Counsel explained that "upon talking to the Union last evening, it was discovered that the Employer has been providing information since this time" and that "[the Union] have not been charged for information requests." For the General Counsel to state that he has reviewed the complaint and ratified it, when an attorney on

his staff withdrew a third of the Complaint after the very first day of the trial certainly casts doubt on the nature and extent of that review.

5. While 29 U.S.C. § 153(d) provides that the General Counsel has unreviewable authority to issue or not issue complaints under that section, the complaint in this case was issued by a General Counsel with no authority to do so. Nothing in the National Labor Relations Act or its Rules and Regulations vests the General Counsel with the authority to cure an invalidly-issued unfair labor practice complaint by ratification.

6. This is not a situation such as existed in Noel Canning, 134 S. Ct. 2550 (2014), where the Board, from which members come and go, can simply reissue a decision from a lawfully constituted quorum. In that context, there was no dispute that the underlying unfair labor practice complaints were properly prosecuted in the first place so there was no prejudice to any aggrieved parties affected by an invalid decision who still retained the right to seek further review of such a decision in an appropriate United States Court of Appeals. By contrast, this case involves an individual who is properly appointed ratifying, long after the fact, a complaint that was improperly issued, by an unlawfully appointed Acting General Counsel, after it has been tried. This is not legally permissible because the ratification effectively serves as a fruit of the poisonous invalidly-issued complaint.

7. The Respondent requests that its opposition be added to the record in this case, only if the Board allows the General Counsel's Notice of Ratification to remain part of the record. For the reasons addressed above, the Respondent opposes the General Counsel's request and moves that his post-hac Notice of Ratification be stricken from the case record and not be considered by the Board.

8. In addition, if the Notice of Ratification remains as part of the record, Respondent moves to strike it for the reasons addressed above and moves for a Board Order requiring the General Counsel to independently investigate this case and make an independent decision to reissue or not issue a complaint alleging a violation of the Act.

Respectfully submitted,

THE RESPONDENT,
BURNDY LLC.

By: /s/ Michael J. Soltis
Michael J. Soltis
JACKSON LEWIS P.C.
1010 Washington Blvd., 7th Floor
Stamford, CT 06901
Tel: (203) 961-0404
Fax: (203) 324-4704

Its Attorneys

Dated: December 7, 2015
Stamford, Connecticut

CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing was sent by Federal Express, on this 7th day of December, 2015 to the following:

Ben Sallemi
International Representative
GMP, Local 39B, AFL-CIO
608 East Baltimore Pike
Media, PA 19063-1735

Humberto Leon
President of Local 485
IUE, AFL-CIO
160 Montague St.
Brooklyn, NY 11201

Sumanth Bollepalli
Kennedy, Jennik & Murray, PC
113 University Pl. Fl. 2
New York, NY 10003

Mr. Thomas E. Quigley
National Labor Relations Board, Region 34
A.A. Ribicoff Federal Building
450 Main Street, Ste. 410
Hartford, CT 06103

Lauren Esposito
Administrative Law Judge
120 West 45th Street, 11th Floor
New York, New York 10036-5503

Joel P. Biblowitz
Associate Chief Administrative Law Judge
120 West 45th Street, 11th Floor
New York, New York 10036-5503

/s/ Joan C. Luu
Joan C. Luu